No. 89-679

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DANIEL BELL, ET AL., PETITIONERS

v.

RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

OF COUNSEL:

ARTHUR B. SPITZER
ELIZABETH SYMONDS
American Civil Liberties
Union Fund of the National
Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036

*JEFFREY F. LISS
BENJAMIN S. BOYD
PIPER & MARBURY
1200 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 861-3900
Attorneys for Petitioner
* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DANIEL BELL, et al.,
Petitioners,

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL

OF THE UNITED STATES, et al.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

Petitioners hereby offer this reply to Respondents' Brief in Opposition to the issuance of a writ of certiorari in this case.

ARGUMENT

1. The Respondents' almost cavalier dismissal of the significance of the first question presented -- whether random testing of federal employees violates the Fourth Amendment -- turns squarely on their expansive reading of this Court's decisions in National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) ("Von Raab"), and Skinner v. Railway Labor Executives' Association, 109 S. Ct. 1402 (1989) ("Skinner"). This expansive reading, so

explicitly set forth in their Brief in Opposition, in turn presents in stark relief precisely what is at issue in this petition: Whether this Court intended and is content to allow its decisions in those two cases to serve as widely-applied support for random testing throughout the federal service.

The factual context and language of those two decisions suggest that this was not the Court's intention. Petitioners have already presented, and will not repeat, the significant factual differences between the situations presented in Skinner and Von Raab and in this case. See Petition at 10-12. However, in approving in Von Raab gateway testing of Customs agents who were directly involved in the interdiction of illegal drugs and/or who were required to carry firearms, and in similarly approving in Skinner testing of train crews involved in accidents and railroad employees who violated certain safety rules, the Court chose its language carefully so as to avoid the use of its decisions as a wholesale license to test federal employees on a random basis.

For example, the Court pointed out that a search lacking individualized suspicion may be justified only in "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy ...." Skinner, 109 S. Ct. at 1417. The Court went on to describe the circumstances -- wholly absent here -- supporting its conclusions that the privacy expectations of the employees in those cases had

been diminished and that real problems, including significant drug abuse[1/] and drug-related bribery and threats, justified gateway (not random) testing. The Court pointed out that the promotion-based testing upheld in Von Raab entailed a diminished impact on privacy rights because "applicants know at the outset that a drug test is a requirement of those positions." 109 S. Ct. at 1394 n.2. Random testing of existing employees, of course, lacks that characteristic. The Court also noted that the employees affected in Skinner have similarly diminished privacy expectations as a result of undergoing mandatory periodic physical examinations. 109 S. Ct. at 1418. And in Von Raab, the Court expressly distinguished Customs employees subject to gateway testing from "most private citizens or government employees in general," who do not have a diminished expectation of privacy. 109 S. Ct. at 1394 (emphasis added).

Nothwithstanding the Court's clear efforts to limit the approval of testing to the circumstances of those cases, the Respondents see little if any difference "between

---

[1/] The Respondents refer in their Brief in Opposition at 2 to "more than a year of study" engaged in by the Department of Justice prior to the issuance of its drug-testing plan. Apparently, that year-plus of study did not include examination, or perhaps failed to yield evidence, of drug abuse, if any, on the part of the employees to be subjected to random testing.

programs that provide for universal testing of a category of employees and random testing programs." Brief in Opposition at 6. Specifically, "the reasoning of Von Raab and Skinner does not justify the sharp distinction that petitioners would draw between programs that provide for random testing of persons holding sensitive positions and programs that prescribe so-called gateway testing ...." Brief in Opposition at 7-8.[2/] The Respondents see no need for "a fundamentally more demanding standard for random testing programs than for those of the type that this Court considered." Id. at 8. Not to extend Von Raab and Skinner

---

[2/] The Respondents challenge unsuccessfully petitioners' analogy to the random highway stops held unconstitutional in Delaware v. Prouse, 440 U.S. 648 (1979), claiming that random drug testing does not involve the same type of "unsettling show of authority" present in such stops. But the Respondents minimize the obvious "unsettling show of authority" entailed when a government employee is randomly selected and told by his supervisors on two hours notice that he or she must partially disrobe and urinate into a cup while being monitored by a government observer.

The Respondents also cite Prouse to assure this Court that random "roadblock" highway stops have this Court's stamp of approval. Brief in Opposition at 10. Such approval, however, has not been given by the Court; indeed, in recognition of the serious constitutional issues involved in such random stops, the Court this term has granted certiorari in a case involving that issue. Michigan State Dept. of Police v. Sitz, 58 U.S. L.W. 3182 (U.S. Oct. 3, 1989) (No. 88-1897).

to random testing "would unduly and artificially limit those decisions." Id.

The government's intention to use Von Raab and Skinner as blanket justification for widespread random drug testing could not be more clear.[3] Assuming, as we believe and maintain, that this Court did not so intend in rendering those decisions, this case presents as fair an opportunity to address these issues as the Court is likely to have.[4]

2. Petitioners will not repeat the numerous reasons why the plan in question also fails because of its categorical approach to testing all employees with top secret clearances, without any examination of the need to test on

---

[3] Indeed, the government continues to implement drug testing plans formulated before the Von Raab and Skinner decisions without regard to the issues decided therein. For instance, the Department of Labor recently issued 30 day notices to test designated employees announcing imminent implementation of random drug testing under a plan that was formulated prior to Von Raab and Skinner and remains unchanged. See Kramer v. Dole, No. 89-3375 (HHG) (D.D.C. filed Dec. 15, 1989).

[4] The government should draw no real comfort from the four court of appeals decisions on random testing issued since Von Raab and Skinner were decided. Unlike the decision below, all four are closely analogous on their facts to, and accordingly stand for no significant extension of, Von Raab and Skinner. See Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989) (random testing approved as to police officers

(Footnote continued on following page.)

a position-by-position basis. See Petition at 16-23. We simply note that the Respondents fail in their Brief in Opposition to identify any logical connection between the fact that an individual has such a clearance and the likelihood that "truly sensitive" information will be compromised by the individual's use of illegal drugs.

In Von Raab, the potential threat was much clearer: Customs agents have information that drug dealers would find valuable, and a drug-using Customs agent -- whose use of drugs might well be known to a given drug dealer -- might compromise that information if the dealer threatened to reveal his or her use or dependency. Indeed, this Court relied on the significant incidence of attempted blackmail of Customs agents in approving gateway testing of

---

(Footnote continued from previous page)

carrying firearms or participating in drug interdiction), cert. denied, 110 S. Ct. 404 (1989); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (random testing approved as to army employees who handle chemical weapons materials); Transport Workers' Union v. Southeastern Pennsylvania Transportation Authority, 884 F.2d 709 (3d Cir. 1989) (random testing approved as to railway operating personnel, in case remanded by Supreme Court with Skinner decision); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (limited approval of random testing of correctional officials who come into regular contact with inmates, are armed, and/or have opportunities to smuggle drugs to prisoners).

Customs agents. Von Raab, 109 S. Ct. at 1392-93. Yet, notwithstanding this threat, the Court declined to authorize testing on the grounds of access to sensitive information because an adequate individualized showing had not been made. Id. at 1397.

In contrast, without any effort whatsoever to make such a showing, the Department of Justice would test anyone with a top secret clearance.[5/] In addition to the constitutional shortcomings of this categorical approach, it is difficult to understand why drug dealers would even be interested in the information to which most of the affected employees are privy. We doubt, for example, that drug dealers would find reason to bribe or blackmail the Freedom of Information Officer of the Antitrust Division.

---

[5] On the issue of over-classification, the Respondents assure the Court that top secret clearances are not available to persons who have a mere possibility of access to truly sensitive information. Rather, all requests for security clearances "must 'contain a demonstrable need for access to classified information' and 'the number of persons cleared and granted access to classified information shall be maintained at the minimum number that is consistent with operational requirements and needs.' 28 C.F.R. 17.95(a)." Brief in Opposition at 14 n.10. Yet the court of appeals below apparently found otherwise, recognizing "some merit to the plaintiffs' contention that '[i]t is reasonable to expect that many individuals holding security clearances do not regularly see or have never actually seen any top secret information ....'" Harmon, 878 F.2d at 492. The court justified its categorical approach in terms

(Footnote continued on following page).

Certainly, the likelihood of such an occurrence cannot justify the substantial intrusion into his privacy rights proposed by the Department.[6/]

(Footnote continued from previous page)

contradictory to the above assurances by the Respondents, citing the need to "provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." Id. The court's rationale simply underlines the too-wide dragnet that the government has cast here in subjecting anyone with a top secret clearance to random testing.

[6/] If the government's fear is instead that drug users short of funds to buy drugs would sell secrets in order to obtain money for drugs, approval of random drug testing on this ground would open the door for an unlimited number of other Fourth Amendment intrusions such as the random searches of employees' homes or records to uncover evidence of gambling debts or other financial problems that might put the secrets known by the employee "at risk."

CONCLUSION

For all of the above reasons, petitioners request that this Court grant their petition for a writ of certiorari.

Respectfully Submitted,

*JEFFREY F. LISS
BENJAMIN S. BOYD
PIPER & MARBURY
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900
Attorneys for Petitioner
* Counsel of Record

OF COUNSEL:

ARTHUR B. SPITZER
ELIZABETH SYMONDS
AMERICAN CIVIL LIBERTIES
UNION FUND OF THE NATIONAL
CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800